

March 11, 2005

EX PARTE - VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte Letter*
Level 3 Petition for Forbearance, CC Docket 03-266
IP-Enabled Services, WC Docket 04-36

Dear Ms. Dortch:

Broadwing Communications, LLC (“Broadwing”)¹ files this *ex parte* letter to reiterate its support for the Petition for Forbearance (“Petition”) filed by Level 3 Communications LLC (“Level 3”) in the above-captioned proceeding.² Broadwing urges the Commission to provide the industry certainty now, rather than deferring to some unspecified date in another proceeding, by clarifying the appropriate form of intercarrier compensation for certain IP-PSTN and PSTN-IP traffic. Over the past several years, numerous complaints have been filed in the courts alleging that various carriers have engaged in traffic routing practices aimed at evading the

¹ Broadwing offers a full suite of data, Internet, voice and managed service solutions on an intelligent, all-optical switched network. The Company will soon offer a feature-rich suite of Internet protocol-enabled (“IP”) services, specifically customized to meet its customers’ requirements, including voice over Internet Protocol (“VoIP”) services. Broadwing will build on its optical switched network to provide a comprehensive product offering that will include web portals, unified messaging and voice virtual private networks for the Company’s enterprise customers. Additional information on Broadwing is available on the company’s website: <http://www.broadwing.com>.

² See Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket 03-266 (filed Dec. 23, 2003) (“Level 3 Petition”). Level 3’s Petition requests that the Commission forbear from enforcing Section 251(g) of the Communications Act of 1934, as amended (“Act”), Rule 51.701(b)(1), and, if applicable, Rule 69.5(b), which would subject IP-PSTN traffic to the reciprocal compensation system rather than the access charge compensation system for most carriers (subject to certain rural exclusions).



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access charge system.³ Regardless of the lawfulness of the practices, accuracy of the allegations, or conclusions reached in these cases, it is clear that by failing to clarify and reform the Byzantine and outmoded intercarrier compensation system, the Commission is effectively ceding its jurisdiction not only to the courts, but also to the self-help actions taken by numerous incumbents. The Commission should reassert its jurisdiction over these issues by taking action on the substantive issue that is at the heart of the Petition now, and concluding as soon as possible the intercarrier compensation reforms efforts it began over three years ago.⁴

Although the Commission has already made significant strides to permit VoIP and other IP-enabled services to operate on a fair and competitive basis,⁵ one of the most important issues concerning these technologies remains unaddressed: whether to subject IP-enabled services to the non-cost-based access charge regime that was broken long before IP-enabled services were available in the marketplace. Broadwing urges the Commission to grant the Petition to ensure that IP-based applications and networks continue to flourish under the competitive and fairer reciprocal compensation system, rather than the outdated and above-cost access charge system.

The Petition is narrowly tailored to apply to IP-PSTN traffic only. Under the existing intercarrier compensation system, the path a particular communication follows is unrelated to carrier compensation. IP-enabled services are inherently portable and challenge traditional regulatory frameworks.⁶ Superimposing a geographic-based, legacy access charge system on non-geographic IP-enabled services will only serve to stifle competition and encourage arbitrage that could seriously undermine the United States communications industry. IP-PSTN communications are information services, and as such are qualitatively different from circuit-

³ See *Southwestern Bell Telephone, L.P. et al. v. Global Crossing Limited et al.*, E.D. Mo., Case No. 4:04cv1573CEJ (filed Feb. 4, 2005) (seeking damages against Global Crossing and several named CLECs under federal and state access tariffs, unjust enrichment, fraud, and civil conspiracy counts); *Southwestern Bell Telephone, L.P. et al. v. VarTec Telecom, Inc. et al.*, E.D. Mo., Case No. 4:04-cv-01303-CEJ (filed Sept. 24, 2004) (seeking damages against VarTec pursuant to SBC's access tariff, as well as levying charges of fraud and civil conspiracy against VarTec, intermediary least cost routers ("LCRs"), and various "John Doe" defendants).

⁴ See *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92 (rel. Apr. 27, 2001).

⁵ See, e.g., *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC-04-27 (rel. Feb. 19, 2004); see also *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order (rel. Nov. 12, 2004) ("Vonage Order").

⁶ See generally *Vonage Order*.

switched services. There is reduced need for government regulation because the competitive marketplace for such services will instill discipline on market participants.⁷ The FCC need only act on the Petition to create regulatory certainty in the IP-enabled service marketplace and to preserve the status quo. Such forbearance will ensure increased innovation of Internet applications and investment in broadband networks. It would also preserve the ability of this industry to provide meaningful competition to providers of legacy telephone services, as well as increase the deployment and adoption of broadband Internet services and networks.

For the above-stated reasons, Broadwing supports Level 3's Petition. The Commission should address Level 3's Petition as soon as possible in order to provide regulatory certainty as to the intercarrier compensation applicable to IP-PSTN traffic. This issue should not be carried over into the Commission's intercarrier compensation reform proceedings. Although intercarrier compensation requires overall reform, unlike other forms of traffic, the status of IP-PSTN traffic will remain in dispute during the pendency of the proceeding, which will only deter investment and spur additional litigation. By granting Level 3's Petition, the Commission will at least lend some modicum of assurance as to how such traffic should be handled pending completion of the Commission's intercarrier compensation reform efforts.

Sincerely,

/s/ John Gockley
John Gockley

Broadwing Communications, LLC

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Commissioner Kevin J. Martin

⁷ For example, numerous VoIP and other IP-enabled service providers have begun to tackle, without FCC requirement, consumer issues such as access to 911 and E-911 services, access for persons with disabilities, and other related social policy goals.